BEFORE THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of:	
FRATERNAL ORDER OF POLICE, LODGE #5	**AAA Case No. 14-20-1100-1232**
and	**Arbitrator: Jay David Goldstein**
CITY OF PHILADELPHIA	**Grievance: Lawrence Tilghman**

STIPULATED ACT 111 AWARD

WHEREAS, the City of Philadelphia ("City") and the Fraternal Order of Police, Lodge No. 5 ("F.O.P.") are parties to a collective bargaining agreement; and,

WHEREAS, Lawrence Tilghman ("Tilghman" or the "Grievant") was employed by the City and a member of the bargaining unit represented by the FOP; and,

WHEREAS, the FOP initiated a grievance on Tilghman's behalf; and,

WHEREAS, the parties wish to resolve this matter and avoid the expense and uncertainties of litigation;

NOW, THEREFORE, the parties agree as follows:

1. The City shall pay the Grievant the lump sum gross amount of $150,000.00, which includes all accrued benefits. If pension contributions are deducted, his pension shall be recalculated accordingly. The payment shall be in full satisfaction of all claims for back pay and benefits by the Grievant and/or FOP from the date of his initial suspension without pay to the date of the issuance of this Award.

2. The City shall rescind the termination of the Grievant and he shall secure a written statement from his physician approving his return to work on light duty.

3. The City shall schedule Grievant for a physical examination by its physicians for approval of return to work on light duty.

4. Upon completion of 2 and 3 above and consistent with the Arbitrator's December 31, 2013 award in this matter, the City shall reinstate the Grievant to duty status as approved by the physicians.

5. Grievant shall immediately apply for a disability pension pursuant to the Pension Code.

6. If the disability pension is granted, Grievant shall commence receipt thereof and retire from employment.

7. If the Pension Board should fail to approve the disability pension application of the Grievant, then the City shall be free to take whatever action it deems appropriate, consistent with applicable Civil Service Regulations.

8. In further consideration of the foregoing, the Grievant agrees to release the City, its departments, boards, agencies, officials, employees and agents from any claims he had, has, or may have against them arising out of the subject matter of the aforementioned grievance.

9. The Grievant further agrees to release the FOP, its officers, members, employees, and agents from any claims he had, has, or may have against them arising out of the subject matter of said grievance, including but not limited to claims of breach of duty of fair representation.

10. This agreement is not intended in any way to set precedent or to prejudice the respective positions of the parties with respect to this matter or any other future disputes, grievances, or any legal matters. This Agreement may not be introduced, or referred to, for any purpose by either party in subsequent administrative, judicial, or any other legal proceedings, except that it may be used in any proceeding necessary to compel enforcement with the Agreement.

11. By entering into this agreement, all parties hereto acknowledge that they have read the agreement, have had the opportunity to review its terms and conditions with their respective counsel, understand said terms and conditions, enter into this agreement voluntarily, and agree to be bound hereby.

WHEREFORE, the FOP, the City, and Tilghman, intending to be legally bound hereby, enter into this agreement as evidenced by their signatures or the signatures of their representatives below on the dates indicated:

[Signatures on following page]

Fraternal Order of Police,
Lodge No. 5
Date: 9-18-15

Officer Lawrence Tilghman
Date: 9-18-15

Philadelphia Police Department
By:
Date: 9/29/15

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF
ARBITRATION BETWEEN:

Fraternal Order of Police, Lodge # 5,

"Union"	:	**AAA # 14 390 1232 11**
-and-	:	
City of Philadelphia,	:	
"Employer"	:	

Grievance: Discharge of Police Officer Lawrence Tilghman
AAA # 14 390 1232 11

AWARD and OPINION

Hearing held: August 8, 2013; Philadelphia, PA

Post Hearing Briefs Received: September 16, 2013

Arbitrator Jay D. Goldstein, Esq.

APPEARANCES

For The Union
Stephen J. Holroyd, Esq.

For The Employer
Diane Loebell, Esq.

INTRODUCTION / ISSUE

The underlying dispute over this employee's appeal [Grievance, Joint Exhibit # 1] of his discharge from employment arose from an incident alleged to be in the nature of a cardinal offense. According to the City, and where sustainable, those type charges are mandated to be terminable offenses. [Brief, by the City] Otherwise and contended by the Union, a series of disciplinary events preceding termination ordinarily apply. In greater detail than summarized here at Introduction, the disciplinary action and further proceedings are discussed under Background, Facts, Party Positions, below.

For ease of reference hereunder and considering there are two [2] legal proceedings under discussion involving former P. O. Tilghman, mention of the earlier and initial Workers Compensation Appeal by the City may also be referred to as the "W.C." matter. The subsequent and pending Arbitration Appeal (of his) Termination by the Union may also be referred to as the "Arbitration". Chronologically, the following applies.

January 2007: "*...Police Officer Lawrence Tilghman* [hereinafter, 'Grievant'] *injured his knees and elbow while on duty*". [Joint Exhibit # 2] "*By his report, he was running, tripped on the cord for his radio, and fell forward, landing on his knees and elbow.*" This according to the City's Brief further notes, "*...He was either off work entirely, or working in modified duty status for more than 4 years. During this time, he was treating with doctors on the H&L panel, as a condition of receiving H&L benefits.* [i.e., his full salary; City Brief]

April 2007; brought forward at arbitration (the City merged multiple theories in argument that) through the deposition testimony of a Dr. S[redacted] (an H &L doctor) that Grievant had engaged in a pattern of inappropriate and deceitful behaviors, tantamount to lying. [City Brief and City Exhibit#] Arguing that while treating with various doctors since the time of his injury, the City maintained that Grievant,

"...did not disclose to the doctors the fact that he had a pre-existing problem with his right knee. He specifically did not disclose that just two and a half months before his injury, he had sought treatment with a Dr. G[redacted], reporting that he had pain and popping in the right knee. According to medical records, and as admitted by Mr. Tilghman, he told Dr. G[redacted] in November 2006 that the knee had been causing him pain for approximately a year and made it difficult for him to play basketball. He had x-rays, and Dr. G[redacted] sent him for an MRI of the right knee. He did not

disclose any of this to Dr. S[redacted] in April 2007. S[redacted] Dep. 58:2 -11; 66:8-18. He only told Dr. S[redacted] that he had occasional episodes of patellar tendonitis prior to the injury. S[redacted] Dep. 57:22. In fact, in his deposition, Dr. S[redacted] was asked to review medical records of another doctor, Dr. S[redacted], who apparently saw Mr. Tilghman in December 2007 for a second opinion. S[redacted] Dep. 59:12-17. Dr. S[redacted] confirmed that ***Dr. S[redacted] did not document*** *that Mr. Tilghman had told him about his prior knee problems either. S[redacted] Dep. 59:23-60:6.* [City's Brief]

Further, continues the City, *"...In his sworn testimony at the Workers' Compensation hearing on January 25, 2011, Mr. Tilghman admitted that he had told Dr. S[redacted] that he had no prior knee pain. Hearing 27:10-13. Dr. S[redacted] specifically stated in his testimony that his diagnosis and conclusions about Mr. Tilghman's condition – and whether the condition was causally related to the work injury – depended on the patient giving him truthful information about his condition and his prior history. S[redacted] Dep. 43:23-44:6. ". . . [A]lot of it has to be based on . . the credibility of this patient." Id. 44:4-6."* [City's Brief]

Consequently, the City's reiterations in its brief are that in/around the referenced time period, "*...he [Grievant] did not disclose any of this to Dr. S[redacted]*" [City Exhibit C-4; City Brief] Therefore and ostensibly the basis for the City's subsequent termination, its charges appear to be based upon both the above events, and those occurring subsequently [January and March, 2011] a Workers Compensation hearing and Police I.A. Investigation.

July 21, 2008; According to the City, Dr. S[redacted] recommends and Grievant undergoes, "*...a bilateral knee release surgery on my right knee.*" [W. C. January 25, 2011 Hearing Transcript, and City Brief]

mid-2010; "*...the City petitioned to terminate these* [sic] *benefit based on findings by its doctor that Mr. Tilghman was fully recovered from his duty-related injury, and* ***that any remaining issues he had with his knees were unrelated to his on-duty injury***" [City Brief] A more specific timeline reference to the City's request for termination of benefits is found at, "*...the question is the claimant's condition on* ***February 16th, 2010****, really.*" [Workers Comp. Hearing Transcript; statement by the ALJ] There was little evidence to explain why the above referenced facts and argument were not presented to the W.C., ALJ/ or thereafter, on appeal to her.

February 12, 2010; Grievant is returned to work, "*...and it was Dr. B[redacted] that sent me back limited duty" [*Workers Comp. Hearing, Transcript, Union Ex. #1]

January 25, 2011; "...*Tilghman* [testified under oath] *before a workers' compensation judge... and the transcript of the hearing was entered in evidence in this case.*" [City Exhibit #3] The City maintains, from this document, that Grievant, "...*gave false testimony under oath before Workers' Compensation Judge Debra Bowers at his Workers' Compensation hearing*" [City Brief].

March 23, 2011; under investigation by this time Grievant gave a statement to a Police Internal Affairs investigator. In its Brief, the City characterizes Grievant's statements therein as, "... *just two months after he testified at the Workers' Compensation hearing, he admitted that he did remember while he was testifying that he had seen Dr. G* [redacted] *and had his knee drained and getting a cortisone shot; he just didn't recall getting an MRI.*" [City Brief, citing City Exhibit # 6]

July 22, 2011; Grievant appeared (with FOP Counsel and a Representative) before an IAD Captain and Narcotics Strike Force Lieutenant and was afforded his Non-Criminal Gnotiek Warnings and opportunity for response to the allegations. Choosing not to respond he was, "...*placed on an immediate 30 day suspension, with the intent to dismiss.*" [Joint Exhibit #2] Attached to the 'Notice of Dismissal'[later issued, 8-19-11, effective 'August 18, 2011'] as Pg. 2 was a summary of the IAD investigation, "...*conducted and determined that you gave false and deceptive testimony during a Workers Compensation hearing on...January 25, 2011"* [Briefs]

July 25, 2011; grievance filed, contending Grievant Tilghman, "...*was Discharged Without Just Cause*". The remedy sought was to, "Make Whole for All Losses." [Joint Exhibit #1;Union Brief] "*The City denied the grievance, and contends that it had just cause to discipline the Grievant, and just cause for discharge* [City Brief] It was appealed to arbitration.

August 18, 2011; "*Nevertheless... [Grievant]was terminated for violating Section 1: 007-10 of the Disciplinary Code, for 'lying under oath to any material facts in any proceedings*" [Union Brief]

September 29, 2011; in a Decision rendered by Workers Compensation Judge D. Bowers, she rendered certain, 'Findings of Fact' and 'Conclusions of Law', which denied the City's Petition to Terminate [P.O. Tilghman's] benefits.

It is notable here and discussed at length below that although the decision itself rendered in that matter was inconsequential and therefore irrelevant to this arbitration proceeding, the document contained findings which were ostensibly reached and thus apparently founded upon supportable, or perhaps contradicted, by that proceedings'

transcript of record. That transcript was correctly relied upon by the City and allowed into the record of this arbitration. [City Exhibit #3] Over objection by the City to the W.C. "Decision" document's inclusion in this record (ostensibly for lacking, 'relevance and/or being prejudicial') the objection was denied and that document moved in as Union Exhibit #1. This was done for completeness of our record and relevancy.

Strikingly, several documents referenced by the W.C. Judge's Decision were introduced by the City in this arbitration proceeding and relied upon to support its principal arguments. [City Exhibits #1, 2, and 4]

As discussed below, the W.C. Judge's decision/Order has no bearing or effect upon this proceeding, or decision. However, where contradictory evidence in this arbitration matter [allegations of lying under oath] was also addressed in the workers compensation proceeding, such evidence/ testimony under oath is deemed to be appropriate for review and comparison purposes.

August 8, 2013; at a hearing held in Philadelphia, PA, both sides were ably represented. Each acknowledged the stated issue(s) were properly before the undersigned Arbitrator, were given full opportunity to present sworn oral testimony, exhibits; and broad opportunity to cross-examine and for rebuttal. Grievant was present and testified.

The Issues at arbitration here were determined to be:
Whether the City had, "*...just cause to discipline the Grievant, and just cause for discharge*" [City Brief, underlining for emphasis added]? *If not, what shall be the remedy?*"

September 16, 2013; "*After the hearing, the parties agreed to provide post-hearing briefs as final argument"* [City Brief]. The Union followed by providing same including cited prior Awards, some relevant.

BACKGROUND, FACTS and PARTY POSITIONS

The facts outlined above at Introduction are substantial and cover those relevant to this matter. The emphasis from the above is provided by the respective summaries of each side's positions, noted below.

There being no formal written transcript of the arbitration proceeding, each side's brief provides the basis for the respective summary.

In summary of the **Employer's Position**, "*The City denied the grievance, and contends... it had just cause to discipline the Grievant, and just cause for discharge*"

As to the dispute between the parties that there are two different standards of discipline in question here, the City believes, "*The City's witness testified, without contradiction, that lying under oath **could be** and **was treated** as a violation of the Police Department Disciplinary Code; it was prosecuted as an Article I violation, Conduct Unbecoming an Officer, Unspecified, using section 1.00. Indeed, the City assumes that the union does not argue that the City could not discipline an officer for such a transgression, if the pre-2010 Code didn't expressly prohibit lying under oath. According* [sp], *it is assumed that the union contends that dismissal was too severe a penalty.*"

The City maintains that, "*One of the very few violations that generally result in dismissal for the first offense is Disciplinary Code 1-§007-10: Lying under oath to any material facts in any proceeding. That is precisely what Mr. Tilghman did in this case. In his Workers' Compensation hearing, under oath, while trying to keep the City from cutting off his worker's compensation benefits and making him come back to work, he denied, repeatedly, that he had ever before had knee pain, denied seeing Dr. G[redacted], denied having x-rays and an MRI—all predating his workplace injury.*"

As for the W.C. Decision, "*the City believes it would be inappropriate for the Arbitrator to give any weight at all to Judge Bowers' conclusions regarding the credibility of the Claimant, Mr. Tilghman.*" [City Brief]

In summary of the **Union's Position** that, "*Section 1-§007-10—the Section under which Tilghman was discharged—was an entirely new section, part of the unilaterally implemented "new" Code that went into effect in May 2010. The FOP challenged this "new" Code by placing the issue before the sitting Act 111 interest arbitration panel, claiming that the City had placed the issue of the "new" Code before the Panel, **had the "new" Code rejected by the Panel**, and then went and imposed the Code anyway.*" [Union Brief] It cites the Act 111 Panel decision:

> "*the Award reaffirms the historic responsibility of arbitrators to adjudicate the penalties imposed whenever a member of the FOP bargaining unit is found guilty of violating any of the City's rules. Therefore, the City cannot, despite the fashion in which it cloaks the penalties it seeks, have those penalties automatically imposed for rule violations without the penalties being considered under traditional arbitration analysis.* That analysis includes such factors as proportionality between the penalty and the harm or threat of harm

caused by the violation (including damage to the Department's image), any disparity in the imposition of the penalty, the officer's length and merit of service, the likelihood of rehabilitation, and the motive for the particular penalty. *In rejecting the City's proposed penalties for the Deadly Sins, the Board steadfastly held to the principle that each instance of violation must be judged individually and without a relentless, uniform, and automatic imposition of punishment.*"

3. *Disciplinary arbitrators remain free to exercise their considered discretion when reviewing penalties the City imposed in cases where "just cause" for discipline is found.*

(UX 2 at 9-11 (emphasis added))

In furtherance of the above argument the Union also reflects upon the following testimony, provided by the City:

Captain M[redacted] conceded that the closest section in the Old Code to the instant violation was Section 1.12, which carried a range of discipline of 10 days to dismissal for a first offense (City Ex. # 5 at 1). The Union also provides: "the City cannot, despite the fashion in which it cloaks the penalties it seeks, have those penalties automatically imposed for rule violations without the penalties being considered under traditional arbitration analysis," (UX 2 at 10), and that "[d]isciplinary arbitrators remain free to exercise their considered discretion when reviewing penalties the City imposed in cases where "just cause" for discipline is found." (UX 2 at 11)

As to the facts, the Union argues that, "*This begs the question: does a failure to recall events that occurred over four years prior constitute a "lie"? A lie is defined as "an assertion of something known or believed to be untrue with intent to deceive." (Webster's Ninth New Collegiate Dictionary, 1983). However, this case reveals no evidence of an intent to deceive. In fact, it is apparently not disputed that Tilghman recalled the treatment in question after being excused from the stand, and wanted to clarify his testimony, but was told it was too late and the matter would have to be addressed in post-hearing submissions.*"

As to the post W.C. proceedings, the Union remarks, "*Tilghman changed attorneys before briefs were submitted, and Attorney Gelman could not testify whether the correction in testimony was submitted in brief. However, a review of the decision of the Workers Compensation Judge makes it clear that she was aware of the facts concerning the denied treatment, and they were squarely before her. For example, she makes reference to the November MRI in her summary of the supplemental deposition testimony of Dr. G[redacted] (UX 1 at 2-3, Section 2(g) of Findings), as well as in her summary of the deposition of Dr. S[redacted] (UX at 7, Section 4(s) of Findings). Thus, it is clear that the November 2006 treatment was part of the record before the Workers Compensation Judge—regardless of source.*"

The Union attempts to distinguish Grievant's testimony, "*...a lie is something more than failure to have a perfect, photographic recollection of events, particularly events that took place over four years earlier.*"; and further to argue it's belief that the W.C. ALJ believed Grievant 's testimony was credible. The Union summarizes as follows: "*It is not in dispute that Tilghman failed to recall that he had treatment on his knee in November 2006. It is also not in dispute that no effort was made by the City during the workers compensation hearing to refresh his recollection and give him an opportunity to recall the treatment and then expound on it. Finally, it is not in dispute that Tilghman immediately expressed an interest to correct the record, and was told by his attorney that it would be taken care of.*"

As to the burdens of proof here, the Union argues the City, *"failed to demonstrate nothing other than a lack of perfect memory and (at worst) **a failure to communicate by his lawyers**. However, the relevant facts were before the Workers Compensation Judge, and she ruled that he was entitled to continued receipt of the Workers Compensation benefit. Stated plainly, the City's case is much ado about nothing, and it has utterly failed to demonstrate just cause."*

In its overview of the case argues the Union, *"Finally, even if all of the facts of this case are viewed in a light most favorable to the City, they still reveal little more than an actor who failed to recall having treatment four years earlier, was not given any opportunity to have his memory refreshed, and who then left it in the hands of his attorneys to make the fact known to the Workers Compensation Judge after he (Tilghman) immediately recalled the treatment after getting off the stand. At worst, this case reveals a situation where Workers Compensation counsel may have failed to disclose the fact (although, again, there is not only no evidence of that, but every indication—given the Judge's references to the November 2006 treatment—that she was aware of the treatment, so it must be presumed that Tilghman's counsel disclosed the fact). Does this "third party" failure justify any discipline, let alone discharge?*

FINDINGS AND OPINION

Careful review of the evidence presented, including all documents and my notes of the testimony given, takes into account the positions taken and arguments advanced by both parties. The relevant portions of the Agreement between the parties contain reference to the 'just cause' standard, which neither side disputes; they merely interpret it differently, and how it should be applied here.

Analysis:

The basic facts are not in dispute here; rather the 'spin', or interpretation of what occurred and the affect surrounding each instance described above under the factual reporting of events. These apparently led the employer [City] to give up on this employee and take the draconian step of terminating his employment. Yet what appears to be a simple case of 'lying under oath' or falsifying testimony is actually a complex set of circumstances, clouded over by factors that were under the control of others. These contributed to Grievant's subsequent 'discharge', i.e., his termination of employment.

There is no question that Grievant is culpable (at the very least) of misrepresenting the facts contained in his medical records, if not outright lying while giving sworn testimony before a Workers Compensation ALJ. Yet what militates against finding the most serious categorization of Grievant's actions are the contributing factors discovered in

both the transcript of that hearing and, contained within the pages of Judge Bowers' "**Decision Rendered Cover Letter (and) ORDER**".

The City is quite right in its argument before me that the outcome of that W.C. proceeding is not determinative [nor does it *per se* influence] this arbitration proceeding. However, there are significant factors which occurred during and perhaps failed after the W.C. proceeding that matter here in that they present factors in mitigation of the termination penalty imposed by the City. Thus, portions of the document [Union Ex. #4; 'Procedural History, Findings of Fact and Conclusions of Law'] are relevant and somewhat helpful as background to certain facts in dispute at this arbitration proceeding. Moreover, they have a bearing on the outcome of this proceeding.

Clearly, the Administrative Judge reached a determination based upon some factors, likely similar factors to those subsequently presented in the arbitration proceeding before us. While credibility of parties/ and other participants in arbitration usually has a bearing on the outcome; any determination of same in the W.C. proceeding is neither relevant nor persuasive here.

Grievant's 'story' at this arbitration did not exonerate him from wrongdoing but did [in conjunction with other factors] serve to explain his actions, to a degree that placed his credibility somewhat on par with other 'actors' in this peculiar scenario. An examination of the W.C. transcript [City Exhibit #] when compared with the testimony offered by two lawyers called to testify in this arbitration hearing persuades that the comportment of each one of them in that proceeding was questionable at least, if not contributory to Grievant's actions. The City's counsel in the W.C. hearing appeared overly aggressive in her cross-examination of Grievant and, in conjunction with the actions of Claimant's [now, Grievant] counsel did little to clarify Grievant's befuddled answers.

Both W.C. lawyers could have presented Grievant with documentation to refresh his recollection about medical treatment events which had transpired some years prior to his testimony and yet, each side failed to do so. As to the ostensible fact that Grievant changed counsel after the hearing and before briefs were filed, this may [or not] have affected the outcome of the W.C. proceeding. Likewise, Grievant's failure to correct that record at or immediately post-hearing to it may have been influenced by his then counsel.

This is not an indictment of the respective W.C. counsel performance and yet, the

Administrative Judge apparently reached a determination based upon multiple factors, including Grievant's credibility. Perhaps she failed to see certain inconsistences brought to bear in the (Grievant's) testimony and elicited on cross examination by the City's counsel. Her decision to deny the City's Petition to Terminate Benefits may have been an error, or possibly based upon some judgment on her part that chose to either pay careful attention to the direct and cross examination of the employee [Tilghman] and/or ignore the lawyering tactics used to illicit conflicting and confused testimony.

While the outcome of that proceeding is not determinative [nor specifically influential] in this arbitration proceeding, certain elements occurring during and after the W.C. proceeding do matter here. While there was an obvious agenda if not motive, for Grievants actions, given that continuation of his benefits was riding on the outcome of that proceeding, this lends credence to the City's view (stated in the Issue above) that it had a correct impression regarding need for some disciplinary action. ['Whether the City had, "just cause to discipline the Grievant, and just cause for discharge"; City Brief]' Therefore it is persuasive that Grievant deserves serious discipline, but short of termination.

Other Mitigating Factors

While not at the center of the arbitration controversy here, a troublesome question persists and lends some credence for the need to mitigate penalty here. If the City was annoyed over the result of its 'Petition to Terminate' benefits appeal, it certainly had the right to seek some reconsideration of the W.C. Judge's determination. There is no evidence it did so and this provides a question of the City's motivation for termination as penalty, instead. Perhaps an oversimplification, but it appears as if perhaps 'two bites' were anticipated, and thus provides another basis for mitigation of the penalty here.

Also relevant are several other factors, each of which are connected to that W/C proceeding and provide multiple reasons for mitigation of penalty. The first involves improper motivation by the City to terminate, as described above.

Yet it does not appear as simple coincidence that the City finalized a termination action after filing for but, before it failed to prevail in its Petition to Terminate Benefits. If the City assumed Grievant would not prevail in maintaining his W.C. benefits and then he did, there seems to have been a rush to judgment for terminating him when it did.

Seemingly of import on this arbitration record is the absence of any evidence that the City took appropriate action to rectify a seemingly apparent and obvious mistake on the record of hearing before the ALJ. These factors present several elements for consideration of the basic just cause questions, particularly here involving improper motive for termination and whether the penalty was appropriate under all attendant circumstances.

In **summary** presentation, the City had just cause to discipline Grievant severely, for his part in what transpired during and after a Workers Compensation proceeding to terminate his benefits. The record of that hearing presented in this arbitration [City Exhibit # 3, Union Exhibit #1 and including the testimony of two lawyers] demonstrates convincingly that inappropriate behavior occurred during the underlying W.C. proceeding, but which was collectively shared between Grievant and others involved in that process.

While that behavior includes seemingly less than forthright testimony by Grievant (while under oath at a Workers Compensation hearing) ample evidence shows he attempted [with I.A., at least] to clarify his mistakes. Further, transcripts of that hearing and testimony at this arbitration reveal that counsel for both sides at the W.C. hearing took both active and passive roles that contributed to Grievant's demise. While not for any arbitrator to examine or micro-manage those roles, nor to do either in an *ex post facto* mode, it is enough to examine the outcome of that proceeding in order to realize the City may have had an improper motive to terminate Grievant. Such a motive is deemed improper under any just cause standard.

The above factors contributing to a lack of just cause, including a need to mitigate penalty when an employer has not considered the full range of penalties, are consistent with the underlying facts found here. Conversely, disciplinary action in the form of a strong punishment to Grievant was not only warranted in order to correct his behavior, but to send a clear signal to other City employees that such behavior, or similar, will not be tolerated.

Even acknowledging that but for the conditions examined more carefully in this record, Grievant's testimony does appear less than truthful, these provide the basis for mitigation of penalty. The underlying record in this arbitration proceeding does not contain evidence that Employer paused to consider the evidence found (perhaps, only at this hearing) and that Grievant might not have been lying with intent, but only hard-pressed to answer candidly or in a straightforward manner while under a withering cross examination.

While the union seeks reinstatement and, "a make whole remedy", the question of prior status makes any grievant discharged while on a light duty assignment (being there as a result of inability to perform his normally assigned duties) has re-instatement obstacles to overcome. Under the circumstances outlined above, the Award follows.

AWARD

The grievance is denied in part, as the City had a 'just cause' obligation to impose discipline on Grievant for his role in providing less-than-truthful sworn testimony during an earlier W.C. proceeding. However, the grievance is sustained as to the harshness of the termination penalty imposed.

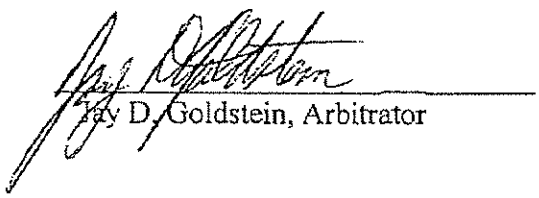
Termination was excessive under all the attendant circumstances here. These include that the agreed upon just cause standard required the City to impose an appropriate penalty consistent with both a specific infraction and any mitigating circumstances, which was not followed in this case. The City's rush to judgment here precluded any consideration of lesser penalties. Moreover, other mitigating factors which emerged during and after Grievant's Workers Compensation proceeding were not carefully considered when imposing termination, also discussed above.

Accordingly, the mitigating circumstances addressed hereunder dictate that termination as penalty being too harsh, now must be adjusted. An appropriate remedy is also elusive however, as Grievant had been on limited duty as a result of his W.C. status.

Therefore, only a *status quo ante* remedy will be ordered at this time. Grievant shall be returned immediately to the City of Philadelphia rolls in the same personnel status just prior to his removal. His Worker Compensation benefits shall be restored to the same status in effect just prior to his removal, and the termination expunged from his file.

Under the retained jurisdiction of this Arbitrator, the Parties are directed to review the Worker's Compensation status of Grievant to determine what benefits, if any, may have been denied to Grievant as a result of the termination action. Implementation of further remedy, if any, will be reconsidered by this Arbitrator, upon request.

So ordered,



Jay D. Goldstein, Arbitrator

DATED: December 31, 2013
Jenkintown, PA